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No. 91-7849

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEPHEN BUCKLEY,

Petitioner,

v.

J. MICHAEL FITZSIMMONS, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

RULE 15(1) STATEMENT

Respondents submit this statement in accordance with Sup.Ct.R. 15(1) in order to clarify the scope of this Honorable Court's review over Petitioner's claim arising from prejudicial pretrial public statements. Specifically, Petitioner has argued that "[t]he prosecutors, including Fitzsimmons, Knight, and Ryan, orchestrated and participated in a publicity campaign which prejudiced him in the community, with the jury venire and with the trial judge, leading to a hung jury, rather than an acquittal, and the

continuation of an unreasonably high bail for two years thereafter" (*See* Petitioner's Petition for a Writ of *Certiorari* (hereinafter Petition, p. 23). In addition to former State's Attorney J. Michael Fitzsimmons' public statement in connection with the announcement of Petitioner's indictment, Petitioner now claims that certain other statements were uttered "while petitioner was either on trial or in custody awaiting trial" (*See* Petition, p. 23).

In his questions presented for review, however, Petitioner limits his petition for *certiorari* to only Fitzsimmons' public statement delivered in connection with the announcement of Petitioner's indictment (*See* Petitioner's Questions Presented for Review, No. 2). Accordingly, this Honorable Court should confine itself, as have the lower courts, to that same statement. *See Yee v. City of Escondido, Cal.*, 112 S.Ct. 1522, 1532-34 (1992) (only questions fairly included within those set forth in petition will be considered).

All other public statements challenged by Petitioner were uttered after Petitioner's bail was set and his trial completed,[1] and could not, therefore, have contributed to the denial of the federally protected rights for which Petitioner seeks redress. After the announcement of Petitioner's indictment, the next public statement occurred following the completion of Petitioner's trial and involved prosecutor Thomas Knight's declaration that Petitioner would be retried (*See* Appendix E to petition, p. 14, para. 58). Petitioner next alleged that Fitzsimmons and Knight made "additional post-trial statements" declaring that Petitioner was guilty (*See* Appendix E, p. 14, para. 59)

[1] Petitioner's bail was set at Three Million Dollars ($3,000,000.00) when he was indicted in March, 1984 (Petition, p. 6). The trial occurred in January, 1985 (Petition, p. 7).

(emphasis added). Petitioner also challenged prosecutor Knight's public statements which discredited Brian Dugan's confession (*See* Appendix E, p. 15, para. 65). Dugan did not confess until June of 1985, several months after Petitioner's trial had been completed (*See* Appendix E, p. 14, para. 60). Next, Petitioner alleged that prosecutor Robert Kilander deliberately caused a false and inculpatory statement to be published about Petitioner in September of 1985, again several months after Petitioner's trial (*See* Appendix E, p. 16, para 68). Finally, Petitioner claims the prosecutors made pretextual public statements explaining the dismissal of the charges in March of 1987 (*See* Appendix E, p. 17, para. 72).

Only Defendant Fitzsimmons' announcement of Petitioner's indictment could possibly have contributed to the setting of Petitioner's bail or to any unfairness in Petitioner's trial. Agreeing with that reasoning, Federal District Judge Harry D. Leinenweber dismissed Petitioner's claims arising from the prosecutors' public statements with the exception of the statement delivered by Fitzsimmons when announcing Petitioner's indictment (*See* Appendix D to Petition, pp. 27-29). Likewise, the Seventh Circuit has twice limited its review of the publicity issue to the single statement which was delivered by Defendant Fitzsimmons. *See Buckley v. Fitzsimmons*, 919 F.2d 1230, 1242-43 (7th Cir. 1990) (hereinafter *Buckley I*); *Buckley v. Fitzsimmons*, 952 F.2d 965, 966 (7th Cir. 1992) (hereinafter *Buckley II*). For the foregoing reasons, Respondents suggest this Court should do the same.

SUMMARY OF ARGUMENT

Though separated into three sections—two dealing with prosecutorial immunity and one with witness immunity—the Respondents' brief in opposition to Petitioner's petition for *certiorari* is essentially premised upon a single overriding theme. Specifically, the Seventh Circuit's focus on the nature of Petitioner's claim and the source of his injury in resolving the immunity issues is entirely consistent with this Honorable Court's decisions in *Burns v. Reed*, 111 S.Ct. 1934 (1991) and *Imbler v. Pachtman*, 424 U.S. 409 (1976).

Argument I deals with the prosecutors' interrogations of Petitioner and other suspects, and the alleged manipulation of the expert witnesses and boot print evidence. Closer scrutiny of the interrogation claim, however, reveals that Petitioner is actually challenging prosecutorial conduct which occurred in front of the grand jury and in the courtroom. Indeed, Petitioner has conceded that he was injured only through the introduction of the fruits of the interrogations at trial and to the grand jury. This concession reveals that Petitioner's targeting of the interrogation process is only a smoke-screen for his true claim which is based upon the introduction of tainted testimony at trial.

Similarly, the prosecutors' alleged manipulation of the expert witnesses and the boot print evidence caused no injury apart from the introduction of testimony to the grand jury and at trial. Again, Petitioner's true claim is premised on the use of tainted testimony.

Skipping over argument II for the moment, the third argument in this brief is similar to the first, except that the category of Defendants seeking immunity is expert

witnesses as opposed to prosecutors. Again, while Petitioner ostensibly targets out-of-court, non-testimonial acts committed by these witnesses, he only claims to have suffered a constitutional injury as a result of the false and misleading testimony and use of reports provided by these witnesses before the grand jury and at trial. Thus, Petitioner suffered injuries only through the witnesses' testimonial acts, which fall comfortably within the umbrella of witness immunity.

Argument II addresses Petitioner's claim that he was deprived of a fair trial by virtue of former DuPage County State's Attorney, J. Michael Fitzsimmons' inflammatory account of his indictment. Because this claim was redressable through a plethora of procedural safeguards inherent in the criminal justice process, argument II is similar to arguments I and III in that all involve an injury allegedly suffered by Petitioner solely as a result of his prosecution.

The claim against Fitzsimmons differs from the claims addressed in arguments I and III, however, because the prosecutorial conduct which allegedly caused the injury—a public statement—did not occur within the confines of the courtroom. Nonetheless, this Court has recognized that immunity must, in certain circumstances, extend to a prosecutor's acts beyond the courtroom when the policies supporting immunity so require.

Here, the rationale upon which *Imbler* was premised supports the extension of immunity to a prosecutor's announcement of an indictment which is alleged to have infringed on a criminal defendant's right to a fair trial. Specifically, the public announcement of an indictment carries with it a significant threat of retaliatory litigation. Nonetheless, such announcements are required of a prosecutor in order to ensure that the public is informed of the important activities of the prosecutor's office. Final-

ly, the full panoply of procedural safeguards available to ensure that the criminal defendant receives a fair trial minimizes the need for a damages remedy.

For all the above reasons, as more fully set forth throughout this brief and in the Seventh Circuit's decisions below, this Honorable Court should deny Petitioner's petition for a writ of *certiorari*.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE COURT OF APPEALS' APPLICATION OF ABSOLUTE IMMUNITY TO THE PROSECUTORS' INTERROGATIONS OF SUSPECTS AND TO THEIR EVALUATIONS OF THE BOOT PRINT EVIDENCE IS CONSISTENT WITH THIS HONORABLE COURT'S DECISION IN *BURNS v. REED*.

Petitioner claims that he is not seeking review of the Seventh Circuit's decision to apply absolute immunity to any of the prosecutors' actions which occurred during the grand jury phase of Petitioner's prosecution or during the criminal trial itself (Petition, pp. 18-22). Rather, Petitioner purportedly confines his petition to the prosecutors' "interrogation of suspects and acquiring [of] opinion evidence concerning the crucial boot print—acts that commenced directly after the crime was committed, months before a grand jury was convened, and a year before anyone was arrested or charged with an offense"[2] (Petition, p. 22).

[2] These acts were allegedly perpetrated by former DuPage County State's Attorney J. Michael Fitzsimmons, and former Assistant

(Footnote continued on following page)

Because the interrogations and the "manufacturing" of boot print evidence did not occur before judicial bodies, Petitioner argues that *Burns* defeats the prosecutors' claim to immunity.

A. Boot Print Evidence

Dealing first with the boot print evidence, the Seventh Circuit rejected Petitioner's position, concluding that Petitioner was essentially dressing up a challenge to the prosecutors' trial activity and trial preparation through reliance on the label "investigative activity." *Buckley II*, 952 F.2d at 966-67. Accepting Petitioner's allegations that the prosecutors contacted several experts, and coerced and manipulated their opinions in search of a positive identification, the Seventh Circuit noted that Petitioner's only injury stemming from these activities occurred when the experts had their reports and opinions presented to the grand and petit juries. *Id.* If immunity for a prosecutor's work before judicial bodies could be defeated by targeting his preparation for courtroom activity, then *Imbler* and its progeny would be effectively whittled to a mere pleading rule. Indeed, every prosecutor worth his salt meets with witnesses and discusses their testimony in advance of trial.

The Seventh Circuit's approach was fully consistent with this Court's decision in *Burns*. There, prosecutor Reed was denied immunity for giving bad legal advice to police which allegedly caused Kathy Burns to be falsely arrested,

[2] *continued*
State's Attorneys Thomas Knight and Patrick King. The allegations are not directed at current State's Attorney James Ryan and his First Assistant Robert Kilander, neither of whom served the County of DuPage in the State's Attorney's Office until well after Petitioner was indicted.

an injury which could not have been averted by a judge. In denying immunity, this Court reasoned that where the suspect is not eventually prosecuted, the judicial process is unavailable as an important check on the prosecutor's out-of-court activities. *Burns*, 111 S.Ct. at 1944.

Immunity was granted to prosecutor Reed, on the other hand, for all of his conduct at a probable cause hearing where he elicited testimony in support of a successful application for a search warrant. In applying immunity to that conduct, the Court relied in part on the availability of the judicial process as a check on prosecutorial misconduct. *Id.* at 1942. Consistent with that approach, the Seventh Circuit has explained the difference between the immunized and non-immunized conduct in *Burns* as follows: "the principle distinction was that the advice (and the officer's acts in reliance on that advice) could cause injury without the mediation of a judge." *Millspaugh v. County Dept. of Welfare*, 937 F.2d 1172, 1175 (7th Cir. 1991).

Petitioner contends that the similarities between *Burns* and *Buckley* are "remarkable," and focuses on the alleged investigative conduct involved in the two cases (Petition, p. 19). Petitioner further argues that the only distinction between *Burns* and *Buckley* lies in the fact that only Stephen Buckley was indicted by a grand jury (Petition, pp. 19-20). Petitioner dismisses this distinction as being "without moment" because the prosecutors in both cases are "alleged to have decided to make, and directed their respective arrests" (Petition, p. 20).

Petitioner places insufficient weight on the central role occupied by both the criminal trial process and by the grand jury in assessing the prosecutors' entitlement to immunity. In deciding to immunize prosecutors for courtroom activities, this Court has consciously encouraged prosecutors to

vigorously and zealously present the State's evidence free of the inhibitions posed by the spector of civil liability. The downside to this immunity, of course, is that overzealous prosecutors functioning without the risk of civil liability will manipulate and abuse the process to the detriment of criminal defendants who are constitutionally guaranteed a free trial. Where the prosecutor functions in the courtroom, however, this concern is minimized because of the plethora of procedural safeguards designed to ensure the fairness of the criminal trial process.

Nowhere is the sufficiency of these safeguards more evident than in connection with the instant case. With respect to the boot print evidence, Petitioner charges the prosecutors with coercing, manipulating and conspiring with the expert witnesses, thus causing an unjustified indictment and depriving Petitioner of a fair trial. This type of claim, however, is particularly well suited to redress in the criminal process. Each testifying expert was subject to full voir dire and cross examination concerning their qualifications, the substance of their opinions and the circumstances surrounding their retention. Moreover, Petitioner was entitled to present his own experts to refute the opinions of the State's experts.

These trial safeguards support the Seventh Circuit's rejection of Petitioner's efforts to analogize the *Buckley* prosecutors' consultations with expert witnesses to the *Burns* prosecutors' advice concerning hypnosis and probable cause. In *Burns*, the trial process was wholly unavailable as a check on the prosecutors' activity. Cathy Burns was hypnotized and then arrested solely pursuant to the collaborative efforts of police and prosecutors, thus giving rise to a false arrest claim which was complete prior to any possibility of judicial review. In this case, by contrast, Petitioner's injuries were allegedly caused by the

criminal justice system's failure to protect him from the abuses of prosecutors. To the extent Petitioner is seeking damages for false arrest akin to those sought by Cathy Burns, the Seventh Circuit has already confirmed that prosecutorial immunities are inapplicable. *Buckley II*, 952 F.2d at 968-69. *Burns* does not compel any broader avenue of relief.

Aside from *Burns*, the line of demarcation between in-court and out-of-court injuries also finds implicit support in *Imbler v. Pachtman*, 424 U.S. 409 (1976). In *Imbler*, this Court was persuaded by common law cases which immunized prosecutors from malicious prosecution claims because prosecutors would otherwise be deflected from vigorously discharging their duties by the fear of retaliatory lawsuits. *Id.* at 421-24. Such concerns about retaliatory behavior are not focused as much on a specific type of prosecutorial conduct as they are on the nature of the criminal defendant's injury—being subjected to unfounded and unfair prosecutions. Indeed, the Plaintiff's injury in *Imbler* was identical to that alleged by Stephen Buckley—wrongful imprisonment and denial of a fair trial in connection with a prosecution for murder. Those who suffer such injuries often will seek to retaliate against the prosecutor.

Similarly, the approaches to prosecutorial immunity taken by other circuit courts of appeal also support, both explicitly and implicitly, the methodology applied by the Seventh Circuit in *Buckley*. In *Lee v. Willins*, 617 F.2d 320 (2nd Cir.), *cert. denied*, 449 U.S. 861 (1980), the Second Circuit held that immunity applies even to investigative activities[3] where the plaintiff seeks to "recover for

[3] The prosecutor in *Lee* was accused of coercing perjured testimony by arresting and incarcerating two witnesses, threatening
(Footnote continued on following page)

an injury arising solely from the prosecution itself—e.g., being compelled to stand trial or to suffer imprisonment or pretrial detention." *Id.* at 322. Only in cases "where the alleged harm is inflicted independently of the prosecution" is absolute immunity inapplicable. *Id.*

The Second Circuit reaffirmed its approach in *Lee* more recently in *Barbera v. Smith*, 836 F.2d 96 (2nd Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989). Ironically, Petitioner relies on *Barbera* for the proposition that immunity does not extend to the acquiring of evidence (Petition, p. 22). *Barbera*, however, involved a prosecutor's failure to provide police protection to a woman who was murdered to prevent her from testifying in a criminal fraud prosecution. *Id.* at 98. The victim's injury—deprivation of life—was suffered independently of the criminal trial process. In the present case, by contrast, the injuries which Petitioner attributes to the expert witnesses occurred when he was prosecuted. The Seventh Circuit's analysis in *Buckley* is, therefore, consistent with *Barbera* and identical to *Lee*.

The absence of an injury attributable to a criminal prosecution also distinguishes the other cases on which Petitioner relies in seeking *certiorari*. In *Forsyth v. Kleindeinst*, 599 F.2d 1203 (3rd Cir. 1979), *cert. denied*, 453 U.S. 913 (1981), the plaintiffs alleged illegal searches and seizures when their conversations were intercepted by federal agents seeking evidence for use in the prosecution of others. Similarly, the plaintiff in *McSurely v. McClellan*,

[3] *continued*
to take away a witness' baby, inducing another witness to refrain from testifying by dropping felony charges against her, and supervising police officers who planted a pistol in Lee's possession. 617 F.2d at 321. These were all out-of-court acts which only caused injury through testimony given at trial.

697 F.2d 309, 312-14 (D.C. Cir. 1982), claimed that his political career was damaged by virtue of the unlawful seizure and dissemination of papers from his home. In *Gobel v. Maricopa County*, 867 F.2d 1201, 1205-06 (9th Cir. 1989), the plaintiffs alleged that inflammatory public statements damaged their reputations and caused them to be falsely arrested and subjected to several hours of dehumanizing jail conditions. Such claims appear to be precisely the types of situations contemplated by the Seventh Circuit as being outside the parameters of prosecutorial immunity. *See Buckley I*, 919 F.2d at 1244.

In summary, distinguishing between in-court and out-of-court injuries is an appropriate method of gauging a prosecutor's entitlement to absolute immunity. This Court's decisions in *Imbler* and *Burns*, as well as those of other circuit courts of appeals, lend credence to this approach. Because the prosecutors' alleged manipulation and coercion of the boot print experts caused Petitioner no injury apart from the presentation of evidence to the grand jury and at trial, the Seventh Circuit's decision to apply immunity to such acts should not be reviewed.

B. Interrogations

Turning to the interrogation issue, the Seventh Circuit has accepted Petitioner's contention that interrogations which occurred out of court are not immunized despite the fact that Petitioner was later prosecuted. *Buckley I*, 919 F.2d at 1244. However, the Court of Appeals also emphasized that the absence of immunity would not help Petitioner unless he could demonstrate an injury flowing directly from the interrogations. *Id.* For that reason, the Seventh Circuit initially remanded the interrogation issue to the district court with instructions that Petitioner be permitted an opportunity to demonstrate a constitutional

violation flowing from the interrogations themselves rather than from the use of in-court testimony shaped from the fruits of those interrogations. *Id.*

Since that time, however, Petitioner has expressly conceded that his "injury only arose when the fruits of the interrogation were used in the criminal process (i.e., statement was presented to the grand jury or at trial)" (*See Buckley v. Fitzsimmons, et al.* No. 90-7574, Petitioner's original Petition for Certiorari, p. 10 & n. 3). Accordingly, while Petitioner seeks to sidestep immunity by targeting interrogations which pre-dated the impaneling of the grand jury, his concession reveals that his true claim is still premised upon the prosecutor's alleged use of tainted testimony before the grand jury and at trial. As in the case of the boot print evidence, the presentation of such testimony is among the clearest examples of immunized conduct under *Imbler*. *See for example Burns*, 111 S.Ct. at 1939.

In the context of interrogations, *Burns* does not compel any broader avenue of liability than that already permitted under *Buckley I & II*. The legal advice given to the police by Prosecutor Reed caused Kathy Burns to suffer a constitutional injury which could not have been averted by a judge. In the instant case, by contrast, the trial process contained safeguards prohibiting the use of the fruits of any improper or unlawful prosecutorial interrogations.

The bottom line is that prosecutors, like police officers and other law enforcement officials, often interrogate individuals in a manner perceived by some as overzealous, improper and even unethical. This is not surprising given the polarized positions of the state and those it prosecutes. Such alleged misconduct, however, is redressable under the Civil Rights Act only if the plaintiff can show that the manner of interrogation deprived him of a federally

protected right. Where the plaintiff's injury stems from in-court testimony fashioned from the fruits of those interrogations, absolute immunity provides an impenetrable hurdle to a damages claim against a prosecutor.

II.

BURNS SUPPORTS THE COURT OF APPEALS' GRANT OF ABSOLUTE IMMUNITY TO FORMER DUPAGE COUNTY STATE'S ATTORNEY J. MICHAEL FITZSIMMONS FOR THE ANNOUNCEMENT OF PETITIONER'S INDICTMENT.

Petitioner has claimed that former DuPage County State's Attorney J. Michael Fitzsimmons' inflammatory summary of the evidence when announcing Petitioner's indictment prevented him from getting a fair criminal trial. Because the only injuries which Petitioner attributed to this statement arose directly from Petitioner's prosecution, the Seventh Circuit held *Burns* did not undercut Fitzsimmons' claim to immunity. *Buckley II*, 952 F.2d at 967-68.

As the Seventh Circuit conceded, however, Fitzsimmons' public statements presented a more difficult question than that posed by the interrogations and obtaining of expert opinions because the public statements neither occurred in court nor did they constitute trial preparation. *Buckley II*, 952 F.2d at 967. Though the interrogations and obtaining of expert opinions also did not themselves occur in the courtroom, the true claims there arose from the introduction of the fruits of those activities during the criminal trial itself. Fitzsimmons' extra-judicial statements are distinguishable in that they were never formally introduced into the trial, but are alleged only to have infected the process.

This distinction, however, should not undercut Fitzsimmons' claim to immunity. Though Fitzsimmons' statements

were not themselves introduced at trial, the criminal justice system nonetheless provides a plethora of safeguards to ward off external infections of the trial process. Specifically, jury voir dire, peremptory challenges, challenges for cause, motions to change venue, and ultimately, motions for dismissal, are all intended to prevent the trial process from being sabotaged by outside influences. In *Burns*, this Court repeatedly mentioned the availability of judicial checks on prosecutorial conduct as a determinative factor in assessing the scope of immunity. *Burns*, 111 S.Ct. at 1942 & 1944. To the extent Petitioner believes these safeguards did not work effectively in his trial, Petitioner's claim against Fitzsimmons is revealed as a "disguised attack on either the institution of the prosecution itself, or the decisions of the judges at the bail hearing and trial." *Buckley I*, 919 F.2d at 1243.

An additional reason to insulate a prosecutor's announcement of a criminal indictment from civil challenges is grounded in the strong public policy encouraging public disclosure of the basis for criminal indictments. While it is true that the common law, rather than public policy, is more instructive on whether a particular claim should be immunized (*Burns*, 111 S.Ct. at 1943), this does not mean that policy reasons should be ignored.[4]

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[4] To the extent the concurring justices in *Burns* deemed an identical common law immunity essential to § 1983 immunity, Respondents note that such a narrow construction of immunities fails to recognize the far broader spectrum of civil liability risks faced by modern, as opposed to common law era prosecutors. This expanded liability is perhaps the best explanation for the absence of corresponding immunities in a number of cases. *See Buckley II*, 952 F.2d at 968. Press conferences and the pervasive impact of mass media on the fairness of criminal trials were neither addressed nor contemplated by the common law.

Specifically, a prosecutor is duty-bound to announce criminal indictments and to inform the public about the important activities of the State's Attorney's Office. *See Ware v. Carey*, 75 Ill.App.3d 906, 394 N.E.2d 690, 695 (1979), *citing ABA Standards Relating to the Administration of Criminal Justice, Compilation*, p. 77 (1974). In light of their obligation to inform, prosecutors would be placed in a difficult quandary if they were immunized from liability stemming from the decision to indict, but not from the announcement of that indictment. Such an interpretation of *Imbler* would allow every criminal defendant who harbors ill-will against his indictor to "attack the substance of the charges laid against him" through a civil rights lawsuit claiming the denial of a fair trial attributable to adverse publicity. *See Buckley II*, 952 F.2d at 968.

The chilling effect of such a precedent warrants serious consideration. If faced with liability for the announcement of an indictment, prosecutors will be predictably reluctant to inform the public of the basis for indictments, particularly in cases of substantial public interest where the public demand for information is greatest. Reluctance would be greater in such cases because the media's more expansive coverage of the announcement would increase the likelihood of a civil rights claim linked to unfavorable publicity. Such reluctance would be inconsistent with the prosecutor's duty to keep the public informed of the important activities of the office and would further erode public confidence in law enforcement in general.

Indeed, the criminal trial process is by nature, public, as the full power of the state is exerted upon the accused. Such governmental action is not, in a democratic society, permissible without public scrutiny and accountability. Against that backdrop, insulating the announcement of criminal indictments from civil rights challenges is vital

to "protecting the free flow of information from the prosecutor" to the public and to "preservation of public awareness and the proper performance of a prosecutor's duties." *Strong v. Slaton*, 510 F.Supp. 161, 163-64 (N.D. Ga. 1981). *See also Sperl v. Duekmegian*, 482 F.Supp. 1026, 1028-29 (C.D. Cal. 1980), *aff'd*, 642 F.2d 1154 (1981); *Gutierrez v. Vergari*, 499 F.Supp. 1040, 1050-52 (S.D. N.Y. 1980).

Petitioner also argues in seeking *certiorari* that immunity in the context of public statements is inconsistent with the functional approach applied in cases such as *Forrester v. White*, 484 U.S. 219, 227 (1988) (Petition, pp. 26-27). However, a fuller examination of *Forrester* and other applicable precedent supports, rather than undercuts, the Seventh Circuit's focus on the nature of Petitioner's injury in assessing the scope of prosecutorial immunity. In *Forrester*, a judge was not entitled to immunity for terminating a probation officer on account of her sex. The probation officer's injury—deprivation of employment—was totally unrelated to any pending or contemplated criminal prosecution.

This Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), also provides a useful illustration. There, the United State's Attorney General was not entitled to absolute immunity for authorizing illegal wiretaps seeking evidence for use in a criminal prosecution against persons other than the target of the wiretaps. *Id.* at 520-24. Once again, the target's injury—illegal search and seizure—was completed out of court without regard to the criminal justice process, which was never initiated against the plaintiff.

Assuming hypothetically that the plaintiffs in *Mitchell* had been prosecuted, and that they had sued the Attorney General for introducing intercepted conversations at trial, immunity would surely have applied. Under that hypothetical, any claim that the criminal justice process was

tainted through the use of illegally seized evidence would have been redressable during the prosecution. Accordingly, while the prosecutorial misconduct was identical in both instances—illegal wiretapping—immunity should apply only where the injury stemmed from the criminal judicial process.

The absence of an injury attributable to the judicial process also undermines Petitioner's efforts to identify a conflict between *Buckley* and the Eleventh Circuit's decisions in *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988). Though the Seventh Circuit actually identified such an inter-circuit conflict (*Buckley I*, 919 F.2d at 1243), the fact is that *Buckley* is easily reconcilable with both *Stepanian* and *Marx*. In *Stepanian*, the Eleventh Circuit addressed the scope of a prosecutor's immunity for public statements in a context completely removed from the criminal process. Indeed, *Stepanian* was not even a civil rights case, but rather, a common law defamation claim. 699 F.2d at 1047. Thus, the harm caused to Petitioner's reputation could not have been addressed either in his criminal trial or, parenthetically, in a civil rights case. *See Paul v. Davis*, 424 U.S. 693 (1976). For that reason, the *Stepanian* court was never presented with a factor deemed central in *Imbler*, *Burns* and in *Buckley*: the ability of the criminal process to ensure a fair trial.

Similarly, in *Marx v. Gumbinner*, *supra*, the plaintiff challenged a prosecutor's defamatory press release explaining the dismissal of rape charges against him. The sole injury alleged was damage to reputation.

All but one of the remaining cases relied on by Buckley in seeking *certiorari* are also inapposite because they did not involve an injury stemming from a criminal prosecution. In *Marrero v. City of Hialeah*, 625 F.2d 499, 511

(5th Cir. 1980), jewelry store owners challenged defamatory statements uttered by prosecutors when announcing their arrests for dealing in stolen property. The charges were soon dismissed and the owners' subsequent civil rights lawsuit alleged that the public statements harmed their business interests. In *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989), an exonerated defendant on bad check charges sued a prosecutor for damage to his reputation caused by defamatory statements delivered by a prosecutor in connection with plaintiff's arrest. The plaintiff in *Helstocki v. Goldstein*, 552 F.2d 564 (3rd Cir. 1977), sued a U.S. Attorney for leaking confidential grand jury information in an attempt to destroy plaintiff's political prospects. Similarly, *Walker v. Cahalan*, 542 F.2d 681 (6th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977), involved only a pendent state law defamation claim because the civil rights claim had been dismissed for lack of a constitutional injury under *Paul v. Davis*, 424 U.S. 693 (1976). Finally, the Seventh Circuit's splintered opinion in *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980), never considered whether immunity should apply to a claim that a prosecutor's public statements deprived the plaintiff of a fair trial and fair bail. *See Buckley I*, 919 F.2d at 1243.

Only in *Powers v. Coe*, 728 F.2d 97, 103 (2nd Cir. 1984), did the plaintiff allege the denial of a fair trial attributable to a prosecutor's dealings with the media. In *Powers*, however, the prosecutor allegedly leaked substantial amounts of secret grand jury information in covert meetings with newspaper and television media representatives. Those private meetings resulted in more than 69 newspaper articles and television reports detailing the plaintiff's allegedly illegal activities. *See* 728 F.2d at 100. Accordingly, the prosecutor was not sued for making public statements at all, but rather, for covertly leaking secret information to

media representatives who then made the information public. None of the public policy reasons encouraging prosecutors to publicly announce indictments are furthered through immunizing covert leaks.

Moreover, to the extent the Second Circuit's decision in *Powers* is deemed analogous to the instant case, it is of questionable precedential value in light of the same court's prior decision in *Lee v. Willins*, 617 F.2d 320 (2nd Cir.), *cert. denied*, 449 U.S. 861 (1980). As previously explained, the Second Circuit held in *Lee* that immunity should apply even to investigative activities where the plaintiff seeks to "recover for an injury arising solely from the prosecution itself—e.g., being compelled to stand trial or to suffer imprisonment or pretrial detention." *Id.* at 322. Immunity is inapplicable only "where the alleged harm is inflicted independently of the prosecution." *Id.*

In light of the preceding explanation, the Seventh Circuit's grant of absolute immunity to J. Michael Fitzsimmons for announcing Petitioner's indictment was consistent with this Court's decisions in *Burns* and *Imbler*.

III.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE THREE EXPERT WITNESSES WHO TESTIFIED AS TO THE BOOT PRINT EVIDENCE WERE ABSOLUTELY IMMUNE FROM LIABILITY UNDER *BRISCOE v. LAHUE*.

Pursuant to *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Seventh Circuit granted immunity to the three expert witnesses who testified during the criminal prosecution as to the boot print evidence. Petitioner claims these experts are not immune because, in altering their reports, the experts engaged in non-testimonial acts pursuant to a conspiracy to "falsely arrest and imprison" Petitioner (Petition, p. 28).

As the Seventh Circuit aptly recognized, however, Petitioner's only injury occasioned by the expert witnesses stemmed from testimony rendered before the grand jury and at trial. Whether these witnesses engaged in non-immunized, non-testimonial conduct is irrelevant because Petitioner was not injured as a result of those acts, but rather, only through the introduction of the fruits of those acts at trial. As Judge Easterbrook wrote, "[i]t would be a hollow immunity if the aggrieved party could turn around and say, in effect: "True, your delivery of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony." *Buckley II*, 952 F.2d at 966, *citing Buckley I*, 919 F.2d at 1245.

Petitioner also perceives a conflict between the Seventh Circuit's opinion and the Second Circuit's decision in *White v. Frank*, 855 F.2d 956 (2nd Cir. 1988). In *White*, the court held that witness immunity does not apply to "complaining witnesses." By complaining witnesses, *White* spoke of witnesses who were responsible for the initiation of charges against a criminal defendant. 855 F.2d at 959-61.

As noted by the Seventh Circuit, none of the three experts who testified against Petitioner can properly be characterized as "complaining witnesses" who initiated the charges against Petitioner. *Buckley I*, 919 F.2d at 1245. None of these witnesses are alleged to have had any axe to grind with Petitioner, and all were contacted initially by the prosecutors, who sought their assistance in evaluating the strength of the evidence against Petitioner. *Id.* Indeed, other than a conclusory claim of conspiracy, the expert witnesses are not alleged to have had any active role in initiating Petitioner's prosecution other than through the furnishing of their expert opinions and tes-

timony. Though Petitioner alleges that the experts presented false opinions, the substance of those opinions does not make the experts "complaining witnesses." If such were the case, every expert witness who testifies in a criminal case would be subject to civil liability for rendering an opinion merely by virtue of a conclusory claim that they conspired to have the plaintiff arrested and imprisoned. Accordingly, although *White v. Frank* appears to suggest a questionable limitation on the scope of *Briscoe*,[5] the propriety of that limitation need not be resolved in this lawsuit. Petitioner's petition for *certiorari* should, therefore, be denied.

[5] In holding that *Briscoe* is not applicable to claims of false arrest and malicious prosecution, or other cases involving "complaining witnesses," the Second Circuit failed to consider that *Briscoe* itself involved so-called complaining witnesses. Both of the consolidated claims in *Briscoe* involved an alleged deprivation of the right to a fair trial. In each case, the civil rights defendant was a police officer who allegedly gave false testimony resulting in the plaintiff's convictions. *See Briscoe*, 460 U.S. at 326-27.

CONCLUSION

For the foregoing reasons, Respondents respectfully suggest that the Seventh Circuit's grant of immunity to the prosecutors and to the expert witnesses is consistent with this Court's opinion in *Burns v. Reed* and, for that reason, Petitioner's Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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